IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER

SP No.12/Bang/2022 **&** IT(TP)A No.175/Bang/2022
Assessment year : 2017-18

Toyota Tsusho India P. Ltd., Plot No.33 & 34, Bidadi Industrial Area, Ramanagara District. 562 109. **PAN: AADCS 6230N**	Vs.	The Joint / Deputy Commissioner of Income Tax, Circle 7(1)(1), Bangalore.
ASSESSEE		RESPONDENT

Assessee by	:	Shri Darpan Kriplani, CA
Respondent by	:	Shri V S Chakrapani, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	29.08.2022
Date of Pronouncement	:	09.09.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal is against the order of the National Faceless Assessement Centre, Delhi [NFAC] passed u/s.143(3) r.w.s.144(13) of the Income Tax Act 1962 (the Act) dated 11.2.2022 for the assessment year 2017-18.

2. The assessee has raised 13 grounds pertaining to TP adjustment and grounds 14 to 16 are with regard to disallowance u/s. 14A of the

Act. Ground No.17 is general. The assessee has also raised additional grounds (No.18 & 19) with regard to the modified assessment order passed by the JCIT, Circle 7(1)(1) (jurisdictional AO), Bangalore modifying the final assessment order passed by NFAC. The additional grounds No.20 to 22 relate to the TP adjustment.

3. During the course of hearing, the ld. AR submitted that the final assessment passed by the NFAC is not in accordance with the directions of DRP and that the modification order passed by the jurisdictional is not tenable. The ld AR prayed for the admission of additional grounds raised in this regard and submitted that if this issue is adjudicated, then the rest of grounds raised by the assessee with regard to the TP adjustment may be left open.

4. The additional grounds raised are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds.

5. The assessee is engaged in the business of trading in automobile components, operating turnkey projects and logistics, primarily catering to automotive industry. The assessee is a wholly owned subsidiary of Toyota Tsusho Corporation, Japan (AE). The assessee filed return of income for the AY 2017-18 on 28.11.2017 declaring NIL income. The case was selected for scrutiny and notice u/s. 143(2) of the Act was duly served on the assessee. Since the assessee had

entered into international transactions with its AE, a reference was made to the TPO to determine the ALP of the transaction. The TPO passed an order proposing TP adjustment of Rs.43,03,79,111. Consequently the AO passed the draft assessment order dated 13.4.2021 incorporating the TP adjustment and also made disallowance u/s. 14A of the Act for an amount of Rs.1,03,81,258 and disallowance towards R&D expenditure of Rs.36,000.

6. Aggrieved the assessee filed the objections before the DRP. The DRP by order dated 18.1.2022 issued directions to the TPO to reconsider the inclusion of certain comparables and also excluded some of the comparables included by the TPO. In the final assessment order dated 11.2.2022, the AO retained the TP adjustment at Rs.43,03,79,111 as in the draft assessment order by stating that the DRP has confirmed the addition made by the TPO. The assessee is in appeal before the Tribunal against the final order of the AO which according to the assessee is not in accordance with the directions of the DRP.

7. During the course of hearing the ld. AR drew our attention to the following directions of the DRP:-

> "5.1.1 **M/s. Archroma India Pvt Ltd**: The argument of the assessee is that this company is involved in manufacture of speciality chemicals and fails the trading sales / total sales filter of 75% applied by the learned TPO and it should be rejected as comparable. In this regard, we direct the TPO to examine whether trading sales / total sales filter is passed by this company.

In case if this filter fails then this company should be excluded as comparable.

5.1.2 **M/s. Tarak Chemicals Limited**: Having considered the submission of the assessee, we note that as per assessee this company is not a comparable as it is functionally dissimilar and fails trading sales / total sales filter of 75%.

From the perusal of the annual report, we note that the company is into manufacture of oil field chemicals which indicate that the company is involved primarily in manufacturing activities. In this regard, we direct the TPO to examine whether trading sales / total sales filter is passed by this company. In case if this filter fails then this company should be excluded as comparable.

5.1.4 **M/s. Sirea India Private Ltd**: Having considered the submission of the assessee, we note that as per assessee this company is not a comparable as it is functionally dissimilar and from the perusal of the annual report, we note that the company is into business of trading of paints and varnish. We find that this company is functionally dissimilar and is directed to be excluded."

8. It is submitted by the ld AR that had the directions of the DRP, been considered the AO/TPO, then the amount of TP adjustment would have undergone change and the revised TP adjustment should have been included in the final assessment order. The ld AR submitted that the TP adjustment is retained in the final assessment order at the same figure as in the draft assessment order and therefore the final assessment order is not in accordance with the directions of the DRP and thus liable to be quashed. The ld. AR further submitted that the AO has wrongly mentioned in para 4.2 of the final assessment order that the DRP had confirmed the addition made by the TPO. In this

regard, the ld. AR relied on the decision of the High Court in the case of *ESPN Star Sports, Mauritius v. UOI & ANR*.

9. The ld. AR also drew our attention to an order passed by the Jt.CIT, Circle 7(1)(1) dated 28.2.2022 as an order giving effect (OGE) to the DRP directions u/s. 143(3) r.w.s. 92CA r.w.s. 144C(13) of the Act wherein the AO has given effect to revised TP adjustment by observing as under:-

> "2. Aggrieved by the draft assessment order, the assessee filed an objection before DRP on TP adjustment and disallowance u/s14A, which was disposed on 18.01.2022 giving directions to TPO. The disallowance u/s 14A was upheld by the DRP. Final assessment Order was passed by Faceless Assessment Unit on 11.02.2022. Based on the directions of DRP, TPO passed an OGE dated 15.2.2022 arriving at total adjustment of Rs 31,38,49,565/-.
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> 3. The assessment made u/s 143(3) r.w.s. 144(13) r.w.s. 144B of the Act dated 11.02.2022 is modified as follows to give effect to the T P adjustment revised after DRP directions:

Assessed income as per Order u/s. 143(3) r.w.s. 144(13) r.w.s. 144B of the Act	44,29,14,102
Less : TP Adjustment	43,03,79,111
Add : TP adjustment as per OGE on TP issues dated 15.02.2022	31,38,49,565
Gross Total Income	**32,63,84,556**

10. In this regard the ld. AR contended that the final assessment order is already passed by NFAC, Delhi on 11.2.2022 and there is no provision under the Act under which it can be modified by the jurisdiction AO who has become *functus officio*. Therefore it is

submitted that the OGE to the DRP directions dated 28.2.2022 passed by the jurisdictional AO revising the TP adjustment is infructuous.

11. The ld. DR relied on the orders of the lower authorities.

12. We have considered the rival submissions and perused the material on record. We notice that the DRP in para 5.1.1 to 5.1.4 as ex extracted above has given clear directions to the TPO to re-examine the inclusion of M/s. Archroma India Pvt Ltd and M/s. Tarak Chemicals Limited and has also directed for the exclusion of M/s. Sirea India Private Ltd. This would mean that the TP adjustment should be recomputed and thus should undergo change. This is supported by the fact that the jurisdictional AO in the OGE to the directions of the DRP dated 28.2.2022 has revised the TP adjustment to Rs.31,38,49,565. However, in the final assessment order passed by NFAC on 11.02.2011 which is passed prior to TPO's order dated 15.2.2022 revising the TP adjustment, the AO has retained the same TP adjustment amount as in the draft assessment order by observing that the DRP has confirmed the addition made by the TPO. From these facts, it becomes clear that the final assessment order passed by the NFAC to the extent of TP adjustment is not in accordance with the directions of the DRP and to this extent, the TP adjustment is quashed.

13. We see merit in the contention that the jurisdictional AO has become *functus officio* once the final assessment order is passed and that there is no authority for him to pass any order modifying the final assessment order. We therefore hold that the order dated 28.02.2022

passed by the jurisdictional AO giving effect to the revised TP adjustment is not sustainable in law and is infructuous. This ground of the assessee is allowed.

14. Since the issue of TP adjustment is quashed on the basis that the final assessment order is not in accordance with the directions of the DRP, we are not adjudicating the rest of the grounds raised with regard to TP adjustment leaving them open.

Disallowance u/s. 14A

15. During the course of proceedings, the AO noticed that the assessee has made an investment in unlisted equity for an amount of Rs.271,35,77,670 and the assessee has claimed interest expenditure of Rs.13,06,47,963. The AO therefore invoked the provisions of section 14A and made a disallowance of an amount of Rs.1,03,81,268. The DRP upheld the disallowance made by the AO.

16. Before us, the ld. AR submitted that the assessee does not have any exempt income and therefore the provisions of section 14A of the Act cannot be invoked. He further submitted that that the provisions of Section 14A of the Act provide for disallowance of expenses incurred in connection with the earning of exempt income and it is clear that the precondition for disallowance under section 14A is that the assessee should have earned exempt income during the year which is not included in the total income of the assessee. Further, such disallowance

cannot exceed the exempt income earned by the taxpayer. Hence, in the absence of receipt of exempt income during the year, section 14A cannot be invoked.

17. The ld AR further submitted that the assessee had also made submissions before the lower authorities that the company had not earned any exempt income and thus disallowance under section 14A of the Act was unwarranted by pointing out that disallowance under section 14A of the Act is not attracted since the assessee has not earned any exempt income and that the assessee has not incurred any specific expenditure in undertaking the investments and therefore no disallowance under section 14A of the Act;

18. The ld AR further submitted that the investments made by the Assessee in the shares of the unlisted company are out of its own funds and hence no disallowance under section 14A of the Act is called for. The ld. AR relied on the recent ruling of the Hon'ble Delhi High Court in the case of *PCIT vs Era Infrastructure (India) Ltd 141 taxmann.com 289 (2022)* and submitted that the ruling of Hon'ble Delhi High Court is squarely applicable to the assessee's case and accordingly the disallowance made under section 14A of the Act is liable to be deleted

19. The ld. DR supported the orders of lower authorities.

20. We heard the rival submissions and perused the material on record. The assessee is contending the disallowance made u/s.14A on the following grounds

(i) The assessee has not earned any exempt income

(ii) The investments are out of own funds

(iii) The assessee has not incurred any specific expenditure towards investments

21. We notice that the AO has made the disallowance on the basis that the investment could potentially earn income which substantiates the contention of the assessee that in the year under consideration the assessee has not earned any exempt income. The Hon'ble Delhi High Court in the case of *Era Infrastructure (India) Ltd (supra)* has considered the issue of disallowance u/s.14A when there is no exempt income and held that no disallowance under section 14A of the Act could be made if no exempt income was earned by the assessee. The relevant part of the judgment is as under:-

> "9. Though the judgment of this Court has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgments passed by the Supreme Court in Kunhayammed v. State of Kerala (2000] 113 Taxman 470/245 ITR 360 and Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association [1992] 3 SCC 1, the present appeal is dismissed being covered by the judgment passed by the learned predecessor Division Bench in IL & FS Energy Development Co. Ltd. (supra) and Cheminvest Ltd. v. CIT [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 (Delhi).
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> 10. Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of IL & FS Energy Development Co. Ltd. (supra)".

22. The Hon'ble Delhi Court in the above has also considered the amendment to section 14A and has held that the explanation inserted to section 14A vide Finance Act 2022 is prospective in nature. The relevant observations are reproduced here under –

> "5. However a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:
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> > "4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.
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> > 5. This amendment will take effect from 1st April, 2022.
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> > 6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income-tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.
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> > *7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years."*
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> > (emphasis supplied)
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> 6. Furthermore, the Supreme Court in Sedco Forex International Drill. Inc. v. CIT [2005] 149 Taxman 352/279 ITR 310 has held that a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. The relevant extract of the said judgment is reproduced hereinbelow:

'9. The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However, the respondents have urged the point before us.

10. In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] was followed in 1989 by a Division Bench of the Gauhati High Court in CIT v. Goslino Mario [(2000) 241 ITR 314 (Gau.)]. It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said: (ITR p. 318)
"[I]t is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on 1-4-1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand. "

11. The reasoning of the Gauhati High Court was expressly affirmed by this Court in CIT v. Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] . These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years.

12. In this state of the law, on 27-2-1999 the Finance Bill, 1999 substituted the Explanation to Section 9(1)(ii) (or what has been referred to by us as the 1999 Explanation). Section 5 of the Bill expressly stated that with effect from 1-4-2000, the substituted Explanation would read:
"Explanation.-For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—
(a) service rendered in India; and
(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India."
The Finance Act, 1999 which followed the Bill incorporated the substituted Explanation to Section 9(1)(ii) without any change.

13. The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker.)] while following the Gujarat High Court's decision in S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] to hold that the Explanation was not declaratory but widened the scope of Section 9(1)(ii). It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in Section 9(1)(ii) of the Act, it did not operate in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period.

14. In the appeal preferred from the decision by the Revenue before this Court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted itself to a question of fact viz. whether the Tribunal had correctly found that the salary of the assessee was paid by a foreign company. This Court dismissed the appeal holding that it was a question of fact. (CIT v. SR Patton [(1998) 8 SCC 608] .)

15. Given this legislative history of Section 9(1)(ii), we can only assume that it was deliberately introduced with effect from 1-4-2000 and therefore intended to apply prospectively [See CIT v. Patel Bros. & Co. Ltd., (1995) 4 SCC 485, 494 (para 18) : (1995) 215 ITR 165]. It was also understood as such by CBDT which issued Circular No. 779 dated 14-9-1999 containing Explanatory Notes on the provisions of the Finance Act, 1999 insofar as it related to direct taxes. It said in paras 5.2 and 5.3.
"5.2 The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for the rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India.
5.3 This amendment will take effect from 1-4-2000, and will accordingly, apply in relation to Assessment Year 2000-2001 and subsequent years".

16. The departmental understanding of the effect of the 1999 Amendment even if it were assumed not to bind the respondents under

section 119 of the Act, nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it.

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139 : 1980 SCC (Tax) 67].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of UP., (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P.) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".' (emphasis supplied)

7. The aforesaid proposition of law has been reiterated by the Supreme Court in M.M. Aqua Technologies Ltd. v. CIT [2021] 129 taxmann.com 145/282 Taxman 281/436 ITR 582. The relevant portion of the said judgment is reproduced hereinbelow:—

"22. Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill Inc. v. CIT, (2005) 12 SCC 717 as follows :

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of UP., (1981) 2 SCC 585]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main

provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24; Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352; CIT v. Podar Cement (P.) Ltd., (1997) 5 SCC 482]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in SG. Pgnatale [(1980) 124 ITR 391 (Guj.)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively." (emphasis supplied)

8. Consequently, this Court is of the view that the amendment of section 14A, which is "for removal of doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.

23. Considering the fact that the assessee has not earned any exempt income during the year under consideration and respectfully following the decision of the Hon'ble Delhi High Court in the case of *Era Infrastructure India Ltd.* (supra) we hold that no disallowance is warranted u/s.14A and delete the disallowance made in this regard.

24. In the result, the appeal is allowed in favour of the assessee.

25. Since the appeal is allowed in favour of the assessee, the stay petition of the assessee in SP No.12/Bang/2022 is rendered infructuous not warranting any adjudication.

Pronounced in the open court on this 9th day of September, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 9th September, 2022.

/*Desai S Murthy /*

Copy to:

1. Assessee 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.